Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, *et al*.	)	MB Docket No. 05-192
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

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REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits this reply in response to the opening comments filed in the above-captioned proceedings. The record developed in response to the Further Notice of Proposed Rulemaking ("FNPRM")[1] confirms that there is no legal or policy justification for adopting additional presumptions to govern program access complaint proceedings. Because TWC already fully addressed the presumptions raised by the FNPRM in its opening comments, TWC focuses in this reply on two new proposals advanced by the

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[1] *Revision of the Commission's Program Access Rules, et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 27 FCC Rcd 12605 ("Order" or "FNPRM").

American Cable Association ("ACA"). In short, ACA's new proposals are beyond the scope of the FNPRM and are meritless in any event, and the Commission should reject them accordingly.

INTRODUCTION

As TWC has explained and as a number of commenters agree, the new evidentiary presumptions raised in the FNPRM—including presumptions involving exclusive contracts for regional sports networks ("RSNs") and national sports networks, as well as a presumption against previously challenged exclusive contracts—cannot be justified in today's marketplace and would represent a significant step in the wrong direction.[2] These presumptions would tilt the program access complaint process against cable operators and their affiliated programming vendors at a time when horizontal concentration among multichannel video programming distributors ("MVPDs") and vertical integration in the industry are at all-time lows, instead of continuing the Commission's recent efforts to scale back cable-centric program access mandates to account for increased MVPD competition and consumer choice.[3] To the extent the Commission is concerned with market power held by programming vendors, it should look into considering whether it can and should address those concerns head on, rather than through myopic and outmoded regulation of vertical integration involving only cable operators and their affiliated programming vendors. As noted in TWC's opening comments, such regulation is both

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2 *See* Comments of Time Warner Cable Inc., MB Docket Nos. 12-68, *et al.* (filed Dec. 14, 2012) ("TWC Comments"); *see also* Comments of Comcast Corp. and NBC Universal Media, LLC, MB Docket Nos. 12-68, *et al.*, at 6-17 (filed Dec. 14, 2012); Comments of Cablevision Corp., MB Docket Nos. 12-68, *et al.*, at 4-11 (filed Dec. 14, 2012); Comments of the National Cable & Telecommunications Association, MB Docket Nos. 12-68, *et al.*, at 5-11 (filed Dec. 14, 2012); Comments of Madison Square Garden Co., MB Docket Nos. 12-68, *et al.*, at 4-15 (filed Dec. 14, 2012).

3 *See* Order ¶¶ 31-40 (concluding that, under today's marketplace conditions, the Commission's prior ban on exclusive contracts between cable operators and their affiliated, satellite-delivered programming vendors is no longer "necessary to preserve and protect competition and diversity in the distribution of video programming").

over- and under-inclusive, as it targets certain cable agreements that present no material risk of harming the public interest while ignoring non-cable arrangements that have a far more significant impact on competition.[4] Thus, while there is serious doubt as to whether *any* cable-centric program access mandates are justifiable in today's marketplace, particularly in light of the serious constitutional concerns posed by the regime as a whole,[5] the Commission plainly should avoid saddling cable operators and their affiliated programmers with additional regulatory burdens and enabling program access complainants to prevail primarily because of a skewed process. At a minimum, the Commission should give its recently adopted case-by-case approach for exclusive contracts a chance to play out in practice, rather than assume, at the outset of that new regime, that additional presumptions are warranted.[6]

Commenters favoring new presumptions offer no rational justification for adopting such proposals, and grasp at straws in attempting to identify empirical evidence that might support them. The assertions of the United States Telecom Association ("USTA") regarding TWC's recently launched RSNs in Southern California ring particularly hollow. Contrary to USTA's contentions, TWC has not "withheld" these RSNs from any competing multichannel video programming distributor ("MVPD").[7] TWC made clear as soon as it reached its deal with the Los Angeles Lakers that its goal was to make the RSNs "available to all satellite, cable and telco distributors in the Lakers' territory," at reasonable rates reflecting the substantial costs of

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4 *See* TWC Comments at 6-7.

5 *See id.* at 6 (explaining that the program access regime implicates core First Amendment rights by impeding the freedom of cable operators and their affiliated programmers to choose when and under what circumstances to license content to competitors, and by singling out cable operators for more restrictive treatment).

6 *See* Order ¶ 32 (affirming "the adequacy of [the current] case-by-case process" without any of the presumptions raised in the FNPRM).

7 Comments of the United States Telecom Association, MB Docket Nos. 12-68, *et al.*, at 8 (filed Dec. 14, 2012).

providing Lakers games and other attractive sports programming to English- and Spanish-speaking audiences.[8] In keeping with this commitment, these RSNs have successfully reached agreement with every competing MVPD that sought a deal—including Cox and AT&T U-verse,[9] the two MVPDs identified in USTA's comments—and concluded them all within weeks of the RSNs' launch in October 2012. Far from demonstrating any need for yet additional program access mandates, the RSNs' prompt completion of deals with TWC's competitors powerfully undercuts the case for increased regulation that applies exclusively to vertically integrated cable operators/programmers.

Notwithstanding the clear legal and policy reasons for rejecting the presumptions set forth in the FNPRM, ACA argues that the Commission should go even *beyond* those presumptions and adopt additional rules favoring program access complainants. As discussed below, ACA's new proposals—the establishment of a "TRO-like" process for an "immediate 14-day standstill" in program access adjudications, and a determination that any "discrimination" involving a cable-affiliated, terrestrially delivered programming service categorically qualifies as

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8 Press Release, Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season - Time Warner Cable Will Launch Two Regional Sports Networks in HD, Including the First Spanish-Language Regional Sports Network in the United States (Feb, 14, 2011), *available at* http://www.timewarnercable.com/content/twc/en/about-us/press/time_warner_cableandthelosangeleslakerssignlong-termagreementfor.html.

9 *See* Joe Flint, *AT&T Strikes Deal with Time Warner Cable for Lakers Channel*, L.A. TIMES, Oct. 27, 2012, *available at* http://articles.latimes.com/2012/oct/27/entertainment/la-et-ct-lakers-att-20121027; Joe Flint, *Cox Cable Strikes Deal with Time Warner Cable for Lakers Channel*, L.A. TIMES, Nov. 4, 2012, *available at* http://articles.latimes.com/2012/nov/04/entertainment/la-et-ct-cox-lakers-channel-20121104.

an "unfair act"[10]—are well outside the scope of the FNPRM and are without merit in any event. The Commission should reject these proposals.

DISCUSSION

I. THE COMMISSION SHOULD REJECT ACA'S PROPOSAL FOR A NEW, "TRO-LIKE" STANDSTILL PROCEDURE

ACA's first new proposal—the establishment of "a TRO-like process whereby a complainant could obtain, on an *ex parte* basis, an immediate 14-day standstill of an existing programming contract"[11]—should be rejected for several reasons. As a threshold matter, this proposal goes well beyond the scope of the FNPRM, which was expressly limited to exploring five enumerated issues: the four presumptions related to exclusive contracts, and the possible reform of the rules governing MVPD buying groups.[12] The FNPRM did not seek comment on the possibility of establishing a separate "TRO-like" standstill procedure, and ACA certainly identifies no express or implicit basis in the FNPRM for addressing this issue. The Commission routinely rejects efforts by commenters to inject entirely new issues into rulemaking proceedings, and should do the same here.[13]

ACA's new proposal cannot be justified in any event. According to ACA, the perceived "problem" with the Commission's current standstill procedure is that "the process provides the

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10 *See* Comments of the American Cable Association, MB Docket Nos. 12-68, *et al.*, at 49-51, 54 (filed Dec. 15, 2012) ("ACA Comments").

11 *Id.* at 49.

12 *See* FNPRM ¶¶ 6, 74, 82.

13 *See, e.g., Amendment of Part 90 of the Commission's Rules to Permit Terrestrial Trunked Radio (TETRA) Technology*, Report and Order, 27 FCC Rcd 11569 ¶ 13 (2012) (rejecting commenter's attempt to inject an issue "not raised in the NPRM," and explaining that, because the issue "is outside the scope of this proceeding," the Commission would "take no action" on it); *Amendment of Parts 2 and 97 of the Commission's Rules to Facilitate Use by the Amateur Radio Service of the Allocation at 5 MHz*, Report and Order, 26 FCC Rcd 16551 ¶ 42 (2011) (declining to address new issue injected by commenter where "no other party raised this issue" and "it was not within the scope of the NPRM").

defendant with an opportunity to respond to the complainant's request for a standstill and thus must allow the defendant a reasonable amount of time to prepare its response."[14] But allowing defendants to respond to standstill requests—particularly those filed in connection with meritless program access complaints—can hardly be described a "problem." The opportunity to respond before being subject to legal sanction is a bedrock principle of procedural due process,[15] designed "to minimize substantively unfair or mistaken deprivations of property."[16] Here, the significant risk of error in granting an immediate standstill on an *ex parte* basis is compounded by the grave First Amendment implications of such a remedy, which would entail compelling the speech of a cable-affiliated programming vendor without giving it any chance to explain why such a result would be unwarranted.

Even apart from the constitutional and prudential problems with ACA's proposal, the asserted concerns underlying the proposal are unfounded. According to ACA, the current standstill rules are unworkable because they inflexibly "provide the defendant 10 days to respond to a program access standstill petition."[17] But ACA overlooks the fact that the rules already provide for an unusually brief response period, and that the default period applies "unless otherwise directed by the Commission," thus enabling the Commission to further accelerate the pleading cycle if necessary.[18] Indeed, Commission staff routinely establishes more compressed response deadlines in complaint proceedings when a change in the status quo between the parties

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14 ACA Comments at 48.

15 *See Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (holding that the "root requirement" of due process is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest").

16 *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

17 ACA Comments at 47.

18 47 C.F.R. § 76.1003(l)(2).

is imminent. ACA's proposal is an unlawful solution to an illusory problem. The Commission should reject it.

II. THE COMMISSION ALSO SHOULD REJECT ACA'S PROPOSAL THAT ANY "DISCRIMINATION" INVOLVING CABLE-AFFILIATED, TERRESTRIALLY DELIVERED PROGRAMMING SHOULD BE DEEMED AN "UNFAIR ACT"

ACA's other new proposal—a rule providing that any act of "discrimination" involving a cable-affiliated, terrestrially delivered programming service categorically qualifies as an "unfair act" under Section 628(b)[19]—likewise suffers from several fatal flaws. To begin with, this proposal, like ACA's proposal for a "TRO-like" standstill procedure, lacks any express or implicit basis in the FNPRM. As noted above, the FNPRM sought comment only on a handful of proposed presumptions relating to exclusive contracts and on reforms related to MVPD buying groups. ACA's proposal has no bearing on these issues and should be summarily rejected for that reason alone.

Even if ACA's proposal were properly raised in this proceeding, it is foreclosed by the D.C. Circuit's 2011 *Cablevision* decision, which struck down a nearly identical determination by the Commission that "discrimination" and other "[S]ection 628(c)(2)-like conduct involving terrestrial programming constitute[] unfair methods of competition or unfair or deceptive acts or practices within the meaning of [S]ection 628(b)."[20] ACA contends that its proposal circumvents the *Cablevision* decision by defining "discrimination" to exclude certain exemptions identified in Section 628(c)(2), in response to the D.C. Circuit's criticism that the Commission's prior determination would have deemed certain conduct "unfair" even when Congress had expressly

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19 ACA Comments at 59.

20 *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 719-20 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

exempted the conduct from scrutiny under the statute.[21] But ACA does not and cannot demonstrate that its proposal overcomes the various other shortcomings identified in *Cablevision*. For instance, the D.C. Circuit found that the Commission had "failed to justify its assumption that just because Congress treated certain acts involving satellite programming as unfair, the same acts are necessarily unfair in the context of terrestrial programming."[22] ACA falls short of identifying any specific record evidence in this proceeding that would support this flawed "reasoning by analogy."[23] While ACA baldly asserts that the method of delivery "cannot possibly influence the competitive effects of withdrawing the programming,"[24] both the D.C. Circuit and the Commission have indicated otherwise, pointing to the important and precompetitive role that exclusivity plays in "the growth and viability of local cable news networks," which, unlike national networks, are often terrestrially delivered.[25] The D.C. Circuit also found that the Commission could not base its determination on a finding that discrimination in the terrestrial context merely has the "potential" to harm competition.[26] Yet ACA fails to identify any record evidence demonstrating that discrimination involving cable-affiliated, terrestrially delivered programming is *always* "unfair" or otherwise harmful to competition.

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21 *See* ACA Comments at 59-60; *see also Cablevision*, 649 F.3d at 721 (finding that the Commission's prior determination ignored the "important exemption" in Section 628(c)(2)(D) allowing for exclusive contracts "in markets previously served by cable if the Commission concluded, after receiving an exemption request, that the contract is in the public interest" (internal quotation marks and citations omitted)).

22 *Cablevision*, 649 F.3d at 720.

23 *Id.*

24 ACA Comments at 61.

25 *Cablevision*, 649 F.3d at 720 (citing *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010)).

26 *Id.* at 722.

Given the absence of new evidence that might support such a determination, the Commission should decline ACA's invitation to revive a presumption that the D.C. Circuit declared unlawful.

CONCLUSION

For the reasons set forth herein and in TWC's opening comments, the Commission should reject calls to adopt the various presumptions raised in the FNPRM, as well as ACA's improper and unsupported proposals to place a thumb even more firmly on the scale against cable-affiliated programmers in today's competitive MVPD marketplace.

Respectfully submitted,

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